110-59

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 530.

JOSEPH B. HOLLAND, PLAINTIFF IN ERROR,

vs.

JAMES H. CHAMBERS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED MAY 13, 1882.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Missouri, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the March term, 1882, thereof, between James H. Chambers, plaintiff, and Joseph B. Holland, defendant, a manifest error hath happened, to the great damage of the said Joseph B. Holland, defendant, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, *second*, together with this writ, so that you have the same at Washington, D. C., on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 15th day of April, in the year of our Lord one thousand eight hundred and eighty-two.

Issued at office in the city of St. Louis, with the seal of the circuit court of the United States for the eastern district of Missouri, dated as aforesaid.

[SEAL.] M. M. PRICE,
Clerk Circuit Court United States, Eastern District of Missouri,
By A. P. SELBY, *Deputy.*

Allowed by

SAMUEL TREAT, *Judge.*

2 *Return to writ.*

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the *the* record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of said circuit court, at office in the city of St. Louis, this 11th day of May, A. D. 1882.

[SEAL.] M. M. PRICE,
Clerk of said Court,
By A. P. SELBY, *D. C.*

(Indorsed:) No. 2004. United States circuit court, eastern district of Missouri. James H. Chambers vs. Joseph B. Holland. Writ of error to the circuit court of the U. S., east'r' dist. of Missouri. Returned and filed day of 187 . , clerk.

4357——1

3 The United States of America to James H. Chambers, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, D. C., on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Missouri, wherein Joseph B. Holland is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Samuel Treat, judge of the circuit court of the United States for the eastern district of Missouri, this 15th day of April, in the year of our Lord one thousand eight hundred and eighty-two.

SAMUEL TREAT,
Judge United States Circuit Court, Eastern District of Missouri.

4 UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

I return upon this writ that I have executed the same by delivering a copy thereof to Herman A. Haeussler, of the firm of Broadhead, Slayback and Haeussler, attorneys for the within-named James H. Chambers, at St. Louis, in the said eastern district of Missouri, this 11th day of May, A. D. 1882.

FELIX COSTE,
U. S. Marshal, Eastern District of Missouri,
By GEO. N. STEVENS, *Deputy.*

Service, $2.00; mile'ges, 6—$2.06.

(Indorsed:) 2004. United States circuit court, eastern district of Missouri. James H. Chambers vs. Joseph B. Holland. Citation. Filed April 15, 1882. M. M. Price, clerk.

5 UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

In the circuit court of the United States in and for said district.

Be it remembered that on the twentieth day of March, A. D. 1882, at a regular stated term of said circuit court of the United States in and for the eastern district of Missouri, the following, among other proceedings, were had and appear of record, to wit:

JAMES H. CHAMBERS, PLAINTIFF,
vs. } 2004.
JOSEPH B. HOLLAND, DEFENDANT.

Now comes the defendant by S. P. Galt, esquire, his attorney, and files transcript from the St. Louis circuit court, and enters appearance herein.

The following, among other proceedings, were had in said St. Louis circuit court, and appear of record in said transcript, to wit:

6 Be it remembered that on the 19th day of July, A. D. 1879, there was filed in the office of the clerk of the circuit court of the city of S. Louis a certain amended petition, in words and figures following, to wit:

Amended petition.

Circuit court, city of St. Louis, State of Missouri, 8th judicial circuit.

JAMES H. CHAMBERS, PLAINTIFF.
vs.
C. M. SWOPE AND JOSEPH B. HOLLAND, DEFENDANTS. } No. 50172. Room 4.

Now at this day comes the plaintiff and, leave of the court first being had and obtained, files this his amended petition herein, and states that at the times hereinafter mentioned he was engaged in the business of publishing and selling books, and was at one time general agent for D. Appleton & Company, of New York, for the sale of a cyclopædia and other works published by them. Plaintiff states that on the first day of December, 1878, defendants wrote or caused to be written and printed and published *or caused to be written and published* the following false, slanderous, and defamatory matter of and concerning plaintiff, to wit:

(Form 3.)

APPLETON'S (REVISED) CYCLOPEDIA.

7 To the subscribers to the above work in Missouri, Kansas, and Nebraska:

Hereafter you will receive the remaining volumes of the above work from Dr. J. B. Holland, general agent for the entire West and Northwest, office located at Galesburg, Illinois. J. H. Chambers, former agent for Missouri, Kansas, and Nebraska, is no longer connected with D. Appleton & Co.'s publishing-house in any capacity whatever. His connection with said publishing-house ceased December, 1876. I will respectfully refer you to the publishers as to the correctness of the above, notwithstanding anything J. H. Chambers may say to the contrary. Any books he may have delivered of the above edition since then have been secured through a regular system of strategy, fraud, and misrepresentation.

Having been in the employ of said Chambers for five years I am prepared to say that for a member of the Methodist Church and a superintendent of a Sabbath school he is the most accomplished, uncompromising, and unmitigated, scoundrel on this continent. There may be men who, for a single vice, can challenge a comparison (I have never seen them), but for
8 a combination in harmonious blending, in dishonesty, impudence, cowardice, poltroonery, lechery, and leprous rascality of all varieties, he stands without a rival and without a peer. All of which I can substantiate in any respectable community wherein the said Chambers is known, or by honorable gentlemen with whom he has had dealings.

Yours, most obediently,

C. M. SWOPE,
Special Agent.

NEW YORK, *December* 1, 1878.

Plaintiff says that the statements in said printed publication made are grossly libellous and defamatory, and calculated to injure and defame plaintiff; and that the same are and were, and each of them is and was, false and wholly untrue. Yet defendants, well knowing the fact that said statements were and are false, but designing, and intending to injure and defame plaintiff, and to blacken his reputation in the community, and to injure his business, did wantonly and maliciously publish and circulate said statements in the form aforesaid, and they have, and each of them has, sent large numbers of said printed statements to divers and
9 sundry persons in the State of Missouri, Kansas, Nebraska, Iowa, and Illinois, to the great injury of plaintiff. Plaintiff says he has been damaged by said acts of defendants in the sum of fifty thousand dollars, for which he asks judgment.

EVERETT W. PATTISON,
Att'y for Pl'ff.

And afterwards, on the 6th day of October, 1879, the following answer to plaintiff's amended petition was filed.

Answer of def't Holland to am'd pet.

In the circuit court city of St. Louis. Case No. 50172.

JAMES H. CHAMBERS, PLAINTIFF,
vs.
C. M. SWOPE AND J. B. HOLLAND, DEFENDANTS.

Now comes J. B. Holland, one of the defendants herein, and answering the amended petition for himself alone, admits that plaintiff was at one time a bookseller and publisher, and was general agent for D. Appleton & Co., as alleged.

Further answering, this defendant denies each and every other allegation in plaintiff's petition, and, having fully answered, this defendant asks to be hence dismissed with costs.

S. M. SMITH,
Att'y for Def't Holland.

10 And at the October term, 1879, the following proceedings were had, to wit:

Amended ans. of def't Holland to am'd petition.

SATURDAY, *January 24th*, 1880.

JAMES H. CHAMBERS
vs.
C. M. SWOPE ET AL.

Amended answer of J. B. Holland filed by consent, which amended answer is in words and figures following, to wit:

JAMES H. CHAMBERS, PL'FF, vs. C. M. SWOPE AND J. B. HOLLAND, DEF'TS. } Case No. 50172. Room No. 4.

Now comes J. B. Holland, one of the defendants herein, and by leave of court files this his separate amended answer to the amended petition in this case, and denies each and every allegation in said petition, except that plaintiff was at one time general agent for D. Appleton & Co., as alleged.

Further answering, this defendant states that he received a copy of the circular complained of by mail during the month of December, 1878; that some time prior to that date this defendant and plaintiff had been general agents for D. Appleton & Co., for the sale of books, with certain designated territory to each, and that prior to December, 1878, this
11 defendant was informed by D. Appleton & Co. that certain territory had been withdrawn from plaintiff and assigned to this defendant. And this defendant had also been informed prior to that date that plaintiff, after his said removal, was still canvassing said territory by his agents, and in competition with the agents of this defendant; and as a business precaution, and for his own protection and the protection of his employees and canvassers, and that they might be advised of the character of the competition they would be likely to meet from plaintiff and his employees and agents, after plaintiff should be informed of said circular, which he probably would be, this defendant communicated that fact that said circular existed, and its contents, to some of his employees and agents, and that such communication was wholly without malice, and as a necessary business matter.

Wherefore, having fully answered, this defendant asks to be hence discharged with costs.

S. M. SMITH,
Att'y for Def't Holland.

And on the 5th day of February, 1880, the plaintiff filed the
12 following reply, to wit:

Reply to amen'd answer of Holland.

In the circuit court city of St. Louis, State of Mo.

JAMES H. CHAMBERS, PLAINTIFF, vs. C. M. SWOPE & J. B. HOLLAND, DEFT'S. }

Now comes the plaintiff, and for reply to the new matter set up in defendant Holland's separate amended answer to the plaintiff's amended petition, says that each and every material allegation thereof is not true.

That the publication of the foul, ignominious, false, and defamatory libel was not made without malice, as averred by said defendant, but from the basely malicious passions of avarice and business rivalry, and with the malignant motive of building himself up by scattering false and disgraceful

reports unjustly and maliciously, to the injury of plaintiff in his good name and business standing.

Wherefore the plaintiff prays judgment as prayed in this petition.

BROADHEAD, SLAYBACK & HAEUSSLER,
Att'ys for Pl'ff's.

And at the April term, 1880, of said court the following proceedings were had, to wit:

13 *Jury trial progressed.*

MONDAY, *May* 24, 1880.

JAMES H. CHAMBERS
vs.
C. M. SWOPE AND JOSEPH B. HOLLAND.

Now at this day come the *the* plaintiff and the defendant Joseph B. Holland, by their respective attorneys, but the defendant C. M. Swope, although duly called, failed to appear, and this cause coming on for hearing also comes a jury, Benj. A. Quinbur, William Osborn, George E. Hibbard, Charles Kennett, Philip C. Boeschenz, E. J. Haasfurther, Joseph G. Harris, J. T. Bruenning, John Williams, Frederick Loader, Ernst Ziseman, Edward T. Jordan, twelve good and lawful men, who being duly elected, tried, and sworn well and truly to try the issues herein joined between the parties herein, and a true verdict render according to the evidence:

Wherefore the trial of this cause progressed, and not being fully terminable at the hour of adjournment is continued until to-morrow morning.

14 *Trial progressed.*

TUESDAY, *May* 25, 1880.

JAMES H. CHAMBERS
vs.
C. M. SWOPE AND JOSEPH B. HOLLAND.

Now again at this day come said parties, appearing by their respective attorneys, and the defendant C. M. Swope, being again called, comes not; and also come the jury sworn and empanelled herein; wherefore the trial of this cause progressed, and not being fully terminated at the hour of adjournment is continued until to-morrow morning.

Trial finished.—Judgment.

WEDNESDAY, *May* 26, 1880.

JAMES H. CHAMBERS
vs.
C. M. SWOPE AND JOSEPH B. HOLLAND.

Now again at this day come the plaintiff and the defendant Joseph B. Holland, by their respective attorneys; but the defendant C. M. Swope, al-

though being again called, comes not; and also come the jury sworn and empanelled herein; wherefore the trial of this cause pro-
15 gressed, and being fully terminated the jurors aforesaid, on their oaths aforesaid, say they find for the plaintiff, and assess his damages at the sum of twenty thousand dollars.

Therefore it is considered by the court that the plaintiff recover of the defendants the damages aforesaid as assessed, together with his costs and charges herein expended, and have execution therefor.

Verdict and instructions filed.

Which verdict is in words and figures following, to wit:

Verdict.

J. H. CHAMBERS
vs.
C. M. SWOPE & JOSEPH B. HOLLAND.

We, the jury in the above-entitled case, find for the plaintiff, and assess his damages at the sum of twenty thousand dollars.

F. LOADER, *Foreman.*

And afterwards, to wit, at the December term, A. D. 1881, of said circuit court, the following further proceedings were had in said cause; to wit:

16 *Motion for new trial sustained.*

WEDNESDAY, *January 5th*, 1881.

JAMES H. CHAMBERS
vs. } 50172.
C. M. SWOPE ET AL.

Now at this day the motion heretofore filed herein for a new trial being submitted to the court and duly considered, it is ordered by the court that upon the defendant J. B. Holland paying all the costs of the trial term that said motion be sustained; and thereupon, it appearing to the court from the receipt of the clerk of this court this day filed that said costs have been paid, it is ordered by the court that the motion for a new trial herein be sustained, and that the judgment heretofore rendered herein be and the same is in all things set aside and for naught held.

And again, at the December term, A. D. 1881, of said court, the following further proceedings were had in said cause, to wit:

17 *Petition for removal to U. S. court.*

FRIDAY, *January 20th*, 1882.

JAMES H. CHAMBERS
vs. } 50172.
C. M. SWOPE ET AL.

Petition of defendant Holland for the removal of the suit as against him

into the circuit court of the United States in and for the eastern district of Missouri filed; and defendant Holland offers Smith P. Galt as surety, under the laws of the United States in such case made and provided. The court accepts said surety. Bond for removal approved and filed.

In circuit court, city of St. Louis.

CITY OF ST. LOUIS,
State of Missouri:

JAMES H. CHAMBERS, PLAINTIFF,
vs.
C. M. SWOPE AND JOSEPH B. HOLLAND, DEFENDANTS.

To the honorable the circuit court city of St. Louis, city of St. Louis, State of Missouri:

Your petitioner, Joseph B. Holland, respectfully shows that he is one of the defendants in the foregoing entitled suit, and that the said suit was commenced by James H. Chambers, the plaintiff therein, against
18 C. M. Swope and your petitioner, the defendants therein, on the 22nd day of April, 1879, in the said circuit court; that at the time of bringing said suit, to wit, the 22nd day of April, 1879, the said plaintiff, James H. Chambers, was and still is a citizen of said State of Missouri, and a resident thereof; that at the said time of bringing said suit said defendant C. M. Swope was and still is a citizen of said State of Missouri, and a resident thereof; that at the said time of bringing said suit your petitioner was and still is a citizen of the State of Illinois, and a resident thereof. Your petitioner further shows that said suit, as brought as aforesaid and as now pending, was and is to recover by said plaintiff from said defendants the sum of fifty thousand dollars as damages on account of the alleged publishing by the said defendants of a libel of and concerning said plaintiff, which said publishing by your petitioner is by him in said suit denied, except in so far as by law he had the right so to do, and which said publishing by said defendant Swope is by him in said suit wholly denied; and your petitioner further showeth that the amount in dispute in said suit, exclusive of costs, exceeds the sum of
19 five hundred dollars.

Your petitioner further represents that the final trial of said suit has not yet been had; that said suit has not been tried, but is now pending for trial in the said circuit court city of St. Louis, city of St. Louis, State of Missouri; that said suit is one in which there can be a final determination of the controversy, so far as concerns your petitioner, without the presence of the said defendant Swope as a party in said cause; and that your petitioner desires to remove said suit as against your petitioner, and so far as concerns him, into the circuit court of the United States for the eastern district of Missouri, in pursuance of the act of Congress in that behalf provided, to wit, the Revised Statutes of the United States, section 639, subdivision second.

Your petitioner herewith offers his bond, executed by Smith P. Galt as surety, in the penal sum of five hundred dollars, conditioned as by said act of Congress required.

Your petitioner therefore prays that the said bond may be accepted as good and sufficient, according to the said act of Congress, and that
20 said suit may be removed as against your petitioner into the circuit court of the United States in and for said eastern district of Missouri next to be held hereafter, pursuant to the aforesaid acts of Congress in such case made and provided, and that no further proceedings may be had therein as against your petitioner in this court.

And your petitioner will ever pray, &c.

JOSEPH B. HOLLAND,
SMITH P. GALT AND S. M. SMITH,
Attorneys for Defendants Joseph B. Holland.

STATE OF ILLINOIS,
County, ss:

I, Joseph B. Holland, the petitioner in the foregoing petition, being duly sworn, upon my oath say that I have read said petition and know the contents thereof, and that the statement and allegations therein contained are true, as I verily believe.

JOSEPH B. HOLLAND.

Subscribed and sworn to before me and in my presence this 17th day of January, A. D. 1882.

[SEAL.] GEO. A. LAWRENCE,
Notary Public.

21 *Bond.*

Know all men by these presents that we, Joseph B. Holland, as principal, and Smith P. Galt, as surety, are held and firmly bound unto James H. Chambers in the penal sum of five hundred dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, jointly and severally, firmly by these presents.

The condition of this obligation is such that if Joseph B. Holland shall enter or file, or cause to be entered and filed, in the next circuit court of the United States in and for the eastern district of Missouri, on the first day of its session, copies of all process, pleadings, depositions, testimony, and other proceedings concerning or affecting the defendant Joseph B. Holland in a certain suit or action now pending in the circuit court city of St Louis, in the city of St. Louis and State of Missouri, in which James H. Chambers is plaintiff and C. M. Swope and Joseph B. Holland are defendants, and shall do such other appropriate acts as by the act of Congress in that behalf are required to be done upon the removal of such suit from said State court into the said United States ,
22 then this obligation to be void; otherwise to remain in force.

In witness whereof we have hereunto set our hands and seals this 18th day of January, A. D. 1882.

JOSEPH B. HOLLAND. [SEAL.]
SMITH P. GALT. [SEAL.]

Approved in open court this 20th day of Jan'y, A. D. 1882.
Attest:

CHAS. F. VOGEL, *Clerk.*

And afterwards, to wit, at the December term, A. D. 1881, of said court, the following further proceedings were had in said cause, to wit:

Bond approved.

MONDAY, *January 23rd*, 1882.

JAMES H. CHAMBERS
vs.
C. M. SWOPE AND J. B. HOLLAND } 50172.

Now, at this day, comes the defendant J. B. Holland, by attorney, and submits to the court his petition and bond for removal of this case,
23 as to defendant Holland, to United States court, and the court having heard the same, and being fully advised thereof, and it appearing that said defendant J. B. Holland has given a bond herein in the penal sum of five hundred dollars, which has been approved by the court, it is ordered by the court that the clerk of this court forthwith certify to the circuit court of the United States for the eastern district of Missouri a full, true, and complete transcript of the record and proceedings in this cause as far as the same refer to the defendant J. B. Holland and as fully as the same remain of record in this office.

And afterwards, to wit, on the 22nd day of March, A. D. 1882, the plaintiff filed a motion to remand said cause to the St. Louis circuit court, which said motion to remand is in words and figures following, to wit:

Motion to remand cause to State court.

In the United States circuit court, eastern district of Missouri, March term thereof, A. D. 1882.

24 JAMES H. CHAMBERS, PLAINTIFF,
against
CLINTON M. SWOPE AND JOSEPH B. HOLLAND, defendants. } Motion to remand cause to State court.

UNITED STATES OF AMERICA:

In the United States circuit court, eastern district of Missouri.

Now comes the said plaintiff and moves the court to remand the said cause to the St. Louis circuit court, 8th judicial circuit of the State of Missouri, for the following reasons, to wit:

1. Because this honorable court has no jurisdiction to hear or try said cause.

2. Because said cause is a suit for libel and defamation of character against both of said defendants as joint tort-feasors in respect of the injuries complained of, and the presence of both defendants is necessary in order that there can be a final determination of the controversy so far as it concerns either of said defendants; and the said cause has been sought to be removed from the said State court, which was and is a court
25 of competent jurisdiction, on the alleged ground that the defendant

Swope is a citizen and resident of the State of Missouri (where the plaintiff is a citizen and resident), and that the defendant Holland is a citizen and resident of another State, to wit, the State of Illinois, and that "there can be a final determination of the controversy so far as concerns him" (Holland) "without the presence of the other defendant as party in the cause," whereas said suit is not so divisible or severable so as to be finally determined so far as it relates to him (Holland) without the presence of the other defendant, to wit, said Swope.

3. Because this court cannot acquire jurisdiction of such a suit by virtue of the second subdivision of section 639 of the United States Revised Statutes, and cannot oust the State courts of its jurisdiction of same.

4. Because the defendant Swope is not in point of fact a citizen of the State of Missouri, and has no residence or domicile or fixed place of abode in said State of Missouri at any place in said State.

5. Because defendants are both jointly sued, and are both jointly
26 liable in such suit, and there cannot be a separate judgment in said suit, but only one judgment, and plaintiff has the right to look to both of said defendants for the satisfaction of any judgment that may be recovered by plaintiff.

BROADHEAD, SLAYBACK & HAEUSSLER,
Att'ys for Plaintiff.

And afterwards, to wit, on the 4th day of April, A. D. 1882, the following further proceedings were had and appear of record in said cause, to wit:

Order sustaining motion to remand cause to St. Louis circuit court.

JAMES H. CHAMBERS, PLAINTIFF, } 2004.
vs.
JOSEPH B. HOLLAND, DEFENDANT. }

The motion of plaintiff to remand this cause to the St. Louis circuit court having been heretofore submitted, and the court having fully considered the same, it is ordered that said motion be sustained and said cause be, and it is hereby, remanded to said court.

And afterwards, to wit, on the 15th day of April, A. D. 1882,
27 the following further proceedings were had and appear of record in said cause, to wit:

JAMES H. CHAMBERS, PLAINTIFF, } 2004.
vs.
JOSEPH B. HOLLAND, DEFENDANT. }

Order allowing bill of exceptions.

Now comes defendant, by Smith P. Gault, esquire, his attorney, and presents to the court his bill of exceptions, which is allowed, signed, and ordered to be filed and made part of the record herein.

Citation.—Writ of error allowed.

Said defendant also presents to the court a writ of error to remove this

cause to the Supreme Court of the United States, and a citation citing and admonishing said plaintiff to be and appear at a Supreme Court of the United States at the next term thereof, which said writ of error is allowed and said citation signed by the judge; and the said defendant thereupon presents to the court his bond in the penal sum of five hundred dollars, which bond is approved and ordered to be filed.

Which said bill of exceptions is in words and figures following, to wit:

28 *Bill of exceptions.*

In the circuit court of the United States for the eastern district of Missouri, March term, 1882.

JAMES H. CHAMBERS, PLAINTIFF, *vs.* JOSEPH B. HOLLAND, DEFENDANT. } No. 2004.

Be it remembered that heretofore, to wit, on the 22nd day of March, 1882, at the term aforesaid, the plaintiff filed his motion to remand said cause, in words and figures as follows, to wit:

In the United States circuit court, eastern district of Missouri, March term thereof, A. D. 1882.

JAMES H. CHAMBERS, PLAINTIFF, *against* CLINTON M. SWOPE AND JOSEPH B. HOLLAND, defendants.

UNITED STATES OF AMERICA:

In the United States circuit court, eastern district of Missouri.

Motion to remand cause to State court.

29 Now comes the said plaintiff, and moves the court to remand the said cause to the St. Louis circuit court, 8th judicial circuit of the State of Missouri, for the following reasons, to wit:

1. Because this honorable court has no jurisdiction to hear or try said cause:

2. Because said cause is a suit for libel and defamation of character against both of the said defendants, as joint tort-feasors in respect of the injuries complained of, and the presence of both defendants is necessary in order that there can be a final determination of the controversy so far as it concerns either of said defendants; and the said cause has been sought to be removed from the said State court, which was and is a court of competent jurisdiction, on the alleged ground that the defendant Swope is a citizen and resident of the State of Missouri (where the plaintiff is a citizen and resident), and that the defendant Holland is a citizen and resident of another State, to wit, the State of Illinois, and that "there can be a final determination of the controversy so far as concerns him" (Hol-

land) "without the presence of the other defendant as party in the
30 cause," whereas said suit is not so divisible or separable so as to be finally determined so far as it relates to him (Holland) without the presence of the other defendant, to wit, said Swope.

3. Because this court cannot acquire jurisdiction of such a suit by virtue of the second subdivision of section 639 of the United States Revised Statutes, and cannot oust the State court of its jurisdiction of same.

4. Because the defendant Swope is not, in point of fact, a citizen of the State of Missouri, and has no residence or domicile or fixed place of abode in said State of Missouri at any place in said State.

5. Because defendants are both jointly sued and are both jointly liable in such suit, and there cannot be a separate judgment in said suit, but only one judgment, and the plaintiff the right to look to both of said defendants for the satisfaction of any judgment that may be recovered by plaintiff.

BROADHEAD, SLAYBACK & HAEUSSLER,
Atty's for Plaintiff.

Which said motion coming on to be heard was by the court sus-
31 tained, and the said cause ordered to be remanded to the circuit court of the city of St. Louis, to which action of the court the defendant then and there, at the time, duly excepted.

And in order that such action may come of record in said cause the defendant tenders this bill of exceptions, which is accordingly signed and filed herein.

(Signed) SAMUEL TREAT, *Judge.*

The bond heretofore referred to is in words and figures following, to wit:

32 Know all men by these presents that we, Joseph B. Holland, as principal, and Christian Peper and William Ellison, as sureties, are held and firmly bound unto James H. Chambers in the full and just sum of five hundred dollars to be paid to the said James H. Chambers, his heirs, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 15th day of April, in the year of our Lord one thousand eight hundred and eighty-two.

Whereas lately, at the March term, A. D. 1882, of the circuit court of the United States for the eastern district of Missouri, in a suit depending in said court between James H. Chambers, plaintiff, and Joseph B. Holland, defendant, judgment was rendered against the said Joseph B. Holland, remanding said suit to the circuit court city of St. Louis, State of Missouri, and the said Joseph B. Holland having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said James H. Chambers, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now the condition of the above obligation is such that if the said Joseph B. Holland shall prosecute said writ to effect, and answer all dam-

ages and costs if he fail to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of—

JOSEPH B. HOLLAND. [SEAL.]
CHRISTIAN PEPER. [SEAL.]
WM. ELLISON. [SEAL.]

Approved by—

SAMUEL TREAT, *Judge.*

(Indorsed:) No. 2004. United States circuit court, eastern district of Missouri. James H. Chambers vs. Joseph B. Holland. Bond. $500. , principal; , sureties. Filed April 15th, 1882. M. M. Price, clerk.

33 UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

I, M. M. Price, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify the writing hereto attached to be a true transcript of amended petition, answer, reply, judgment in State court, judgment sustaining motion for new trial, petition for removal, order of removal, and proceedings in United States circuit court for said district, in case No. 2004, of James H. Chambers, plaintiff, against Joseph B. Holland, defendant, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office in the city of St. Louis, in said district, this 11th day of May, in the year of our Lord eighteen hundred and eighty-two.

[SEAL.] M. M. PRICE,
Clerk of said Court.
By A. P. SELBY,
Deputy.

34 On the trial of said case the following opinion was delivered by honorable George W. McCrary, circuit judge, to wit:

CHAMBERS
vs.
HOLLAND & SWOPE. } Motion to remand.

MCCRARY, *J:*

It is understood that this is an attempt to remove a part of the case from the State court. One defendant seeks to remove the cause so far as he is concerned, leaving the case as against the other defendant to go on in the State court. This is attempted under the provisions of sec. 639 of the Revised Statutes of the United States, and the proceeding is sought to be upheld under that section, upon the ground that there is a controversy between the defendant removing and this plaintiff (citizens of different States) which can be finally determined "without the presence of the other defendant," who is a citizen of this State. This is denied. But without considering the question whether it be so or not, let us inquire
35 whether, as the law now stands, the case can under any circumstances be split, and one portion tried here and the other in the

State court. This inquiry involves a decision of the question whether the second section of the act of Mar. 3, 1875, repeals or modifies sec. 639 of the Revised Statutes.

That section, among other things, provides as follows: "When the suit is against an alien and a citizen of the State wherein it is brought, or is by a citizen of such State against a citizen of the same and a citizen of another State, it may be removed, as against such alien or citizen of another State, upon the petition of such defendant filed at any time before the time *or* final hearing of the cause, if, so far as it relates to him, it is brought for the purpose of restraining or enjoining him, or is a suit in which there can be a final determination of the controversy so far as concerns him without the presence of the other defendant as parties in the cause." This statute undoubtedly authorized the removal of part of a cause, and if it remains in full force the present cause, so far as it concerns the defendant removing, is properly here, assuming of course that
36 in so far as it concerns him it can be heard and determined without the presence of his codefendant. But the later act of March 3, 1875, deals with the same subject, and the question is whether it does not supersede and modify the earlier statute, at least so far as to require the removal of the whole case, if any part of it is removed.

Sec. 2 of that act provides for the removal of causes involving the sum or value of $500, or under, and in which there shall be a controversy between citizens of different States, and then proceeds as follows: "And when in any suit mentioned in this section there should be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove *said suit* to the circuit court of the United States for the proper district."

We italicise the words "said suit" in the above quotation because we think they were intended to provide for the removal of the whole
37 suit, and not a part of it. The provision manifestly applies to the same class of cases described in the act of 1866, and embodied in section 639, R. S., above quoted.

It may well be supposed that the evils growing out of the practice of attempting to try different parts of the same suit in different forums led Congress to so change the statute as to put an end to that practice. For some purposes the act of 1866 may remain in force, but in so far as it authorized the severance of causes in the State court and the transfer of a part to the Federal court for trial, it is superseded by the act of 1875.

Motion sustained.

38 On the trial of said case the following opinion was delivered by his honor Judge Treat, district judge:

TREAT, *J.*:

While I fully concur that the motion to remand must be sustained, it may be well to add a few suggestions in support *of* thereof. Under the act of 1866 it had been held, with sharp dissents, that a cause pending in a State court could be split into parts, some of which parts could be heard by removal in the U. S. courts, and the others proceeded with in the State courts. Hence this unseemly condition of a cause would prevail in many

instances, viz, that the Federal court would try the cause as to one defendant, and the State court try the same cause at the same time against the other defendants, to the great accumulation of costs and expenses and the possible determination of the rights of the parties differently; so that one party would have his cause adjudicated in one way in the Federal
39 forum, and the other in a different way in the State forum. Under such "splitting" process each court had full jurisdiction of the parties before it and could proceed to final judgment. Thus it might be that two parties jointly sued and jointly liable would be left through separate and final judgments in entirely distinct positions, although their obligations or defences were the same. If judgment in the State court was for the remaining defendant, then why should he not have the benefit of the judgment in his favor, irrespective of what had been determined against the other defendant in the Federal forum, and vice versa? The anomalies of such proceedings, which many courts held to be allowable, led to the change of the rule as indicated in the act of 1875.

My views of the true construction of the act of 1866 were sharply expressed in a dissenting opinion years ago, but the right to "split" cases under the act of 1866 having afterwards been upheld judicially, it
40 became necessary to correct the mischief by statute.

The act of 1875 must be interpreted with reference to all its provisions and to the mischief to be corrected. By its terms the original jurisdiction of Federal courts was enlarged far beyond what had previously existed, designed, apparently, to cover the full sweep of the Federal Constitution.

The first section of that act which pertains to jurisdiction on the ground of the citizenship of the parties merely states what in the light of Federal decisions had a fixed and definite meaning, viz, that all necessary parties, plaintiff or defendant, should be citizens of different States. The long line of Federal decisions on that subject need not be cited or reviewed, for they are familiar to all.

The question of original jurisdiction having been thus established by the first section, the second proceeded to state what cases pending in the State court could be removed. As the jurisdiction of the Federal courts
41 could not, even by an act of Congress, be made to transcend constitutional limits, the act in question prescribed what should, within constitutional limitations, confer original jurisdiction, and what Federal courts might obtain through removals.

It is obvious that what Congress could not confer as original jurisdiction it could not confer through removals. If all the parties must be citizens of different State', except when merely formal, why let some of the parties respectively remove the cause as to them when it could not be wholly determined without the presence of others?

The language of the second section is that where a case is pending in a State court, in which there is "a controversy between citizens of different States," &c., "either party may remove," &c. What is meant by a party? Any one of many plaintiffs or defendants, leaving his coplaintiffs or codefendants in the State court still to pursue or be pursued there, as the case might require, irrespective of the legal fact that the case could not
42 be decided in either court without all of the plaintiffs or defendants?

That no such absurdity was contemplated is clear from the language which follows, in the same section, viz:

"And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which may be fully determined as between them, then either one or more of the plaintiffs or defendants, actually interested in such controversy, may remove," &c.

The question presented under the language last quoted called for a judicial interpretation of words "wholly between citizens of different States." Suppose some of the plaintiffs are citizens of the same State as the defendants and the other plaintiffs are not, or that some of the plaintiffs are non-resident and others resident, and some of the defendants are resident and others non-resident, can any one of said plaintiffs or defendants remove the case? Is not the old rule recognized, viz, that when all the plaint-
43 iffs and all the defendants are citizens of different States then the case is one of which a Federal court would have jurisdiction if originally brought therein; and recognizing that rule when a like case is instituted in a State court, either one of the plaintiffs or defendants in such a case may remove the entire suit? If that be not the true construction of the act of 1875 the former anomalies, and even worse, would prevail. The term "wholly" should apply to the relationship of the parties plaintiff and defendant. A citizen of this State suing, in conjunction with other and necessary plaintiffs who are citizens of another State, citizens of this State should not at the mere instance of a coplaintiff, nor should such citizen defendants be forced, into a foreign jurisdiction. Certainly the citizens of a State are to be considered in such matters as well as non-residents.

The case now here is one for libel, once tried in the State court and removed subsequently. Whether the facts would enable the case to
44 be removed on the ground of time is not now considered, for no point is made thereon. One of the two alleged wrong-doers asks the case to be removed as to him, leaving his codefendant, who is a citizen of the same State as plaintiff, to pursue the controversy between them in the State court, while the plaintiff is brought here to pursue the other wrong-doer in this forum.

Thus the one case, split into two parts, is to proceed at the same time in two different forums. The plaintiff is entitled, if he prevails, to a judgment against both defendants, although he can have only one satisfaction. If the removal is permissible by one, can the case be "wholly" determined with that one only present, or can it be said that the controversy is wholly between citizens of different States?

But the points involved have been fully discussed and settled by the U. S. Supreme Court in the cases of Barney vs. Latham, 103 U. S. Rep., 205, and Blake vs. McKim, 103 U. S. Rep., 336; and hence these comments might have been spared, as they seek only to enforce the reasons and the rules therein expressed. The motion to remand is sustained.

45 UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

I, M. M. Price, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify the writing hereto attached to be true copies of opinions delivered in case No. 2004 of Chambers, plaintiff, against Holland, defendant, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office in the city of St. Louis, in said district, this 28th day of June, in the year of our Lord eighteen hundred and eighty-two.

[SEAL.]

M. M. PRICE,
Clerk of said Court.
By A. P. SELBY,
Deputy.

(Indorsed:) No. 2004. United States circuit court, eastern district of Missouri. Chambers against Holland. Duly certified copy opinions in the above-entitled cause.

(Indorsed:) Supreme Court U. S., 1882, October term. No. 840. Joseph B. Holland, pl'ff in error, vs. Jas. H. Chambers. Certified copy of opinions. Filed 10' July, 1882.

(Indorsement on cover:) No. 530. Joseph B. Holland, plaintiff in error, vs. James H. Chambers. E. Missouri C. C. U. S. Filed 13th May, 1882.

110-59

SUPREME COURT U.S.
FILED
SEP 24 1883
JAMES H. McKENNEY, Clerk.

IN THE

United States Supreme Court

JOSEPH B. HOLLAND, . . *Plaintiff in Error,*

vs.

JAMES H. CHAMBERS, . . *Defendant in Error.*

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF MISSOURI.

MOTION TO DISMISS.

BROADHEAD & HAEUSSLER,
Attorneys for Defendant in Error.

ST. LOUIS: PRINTED BY THE CENTRAL LAW JOURNAL.

IN THE UNITED STATES SUPREME COURT,
OCTOBER TERM, A. D. 1883.

JOSEPH B. HOLLAND, . . *Plaintiff in Error,*

vs.

JAMES H. CHAMBERS, . . *Defendant in Error.*

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF MISSOURI.

To the Honorable, the Judges of the Supreme Court:

Now at this day comes the above named James H. Chambers, defendant in error, by his attorney, and states, that the above entitled cause was removed to this court by writ of error under section five (5) of the act of March 3d, 1875, "to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from the State courts, and for other purposes," for the review of an order of the Circuit Court of the United States for the Eastern District of Missouri, remanding said suit to the St. Louis Circuit in and for the State of Missouri.

Wherefore the said defendant in error moves:

1. That said case be, by the order of this court, advanced and placed upon the motion docket.

2. That the said writ of error in said cause be dismissed.

Because neither the Supreme Court of the United States, nor the Circuit Court of the United States for the Eastern District of Missouri, had or has any jurisdiction over the persons of the parties to said cause, nor of the matter in controversy between them.

JAMES O. BROADHEAD,
Attorney for Defendant in Error.

IN THE

United States Supreme Court

JOSEPH B. HOLLAND, . . *Plaintiff in Error,*

vs.

JAMES H. CHAMBERS, . . *Defendant in Error.*

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF MISSOURI.

MOTION TO DISMISS.

This is a motion to dismiss an appeal from the decision of the circuit court, remanding a case to the State court for want of jurisdiction.

The defendant in error, James H. Chambers, brought an action against Joseph B. Holland, plaintiff in error, and C. M. Swope, in the circuit court of the City of St. Louis, Missouri, to recover damages on account of a joint libel published by defendants.

Chambers is and was a citizen of the State of Missouri, and Holland a citizen of the State of Illinois.

The petition in the original case was filed April 22d, 1879; the cause was tried May 24th, 1880, and the verdict and judgment were for the plaintiff. On January 5th, 1881, the third term after the cause *was tried*, a new trial was granted the defendant. One year thereafter, viz: January 20th, 1882, defendant Holland filed his petition, and affidavit for removal to the United States Circuit Court, stating as grounds therefor, that he was a citizen of the State of Illinois, while his co-defendant, Swope and plantiff were citizens of the State of Missouri, and that it was a suit in which there could be a final determination of the controversy so far as concerns the petitioner, without the presence of defendant Swope, as a party. The court granted the removal so far as Holland was concerned, and split the case; so that the case of Chambers v. Holland comes to the Federal Court, and the case of Chambers v. Swope remains in the State Court, notwithstanding the fact that it was originally one suit, brought on one cause of action, for which defendants were jointly liable and were jointly sued.

After transcript was filed in the United States Circuit Court, plaintiff filed his motion to remand.

The motion was sustained, and defendant thereupon sued out a writ of error to this court.

BRIEF.

The plaintiff in error bases his claim to have the cause removed in the manner it was upon the second clause of § 639 of the Revised Statutes of the United States. This section of the Revised Statutes, so far as it relates to the present case, is the same as the act of 1866. Under the act of 1866, it was held that a cause pending in a State court could be split into parts, some of which parts could be heard by removal in the United States Courts, and the other proceeded with in the State courts, provided the petition was filed at any time before the trial or final hearing of the

cause. So that if the second clause of § 639, was still in force, "the present cause so far as it concerns defendant Holland, is properly in the United States court, assuming of course that it is a suit in which there can be a final determination of the controversy so far as it concerns him without the presence of his co-defendant."

But the fact is, and it has been repeatedly decided by this court that the second clause of § 639 of the Rev. Stat. and the act of 1866, were repealed and superceded by the act of March 3rd, 1875.

See Hyde v. Ruble, 104, U. S. 407.
King v. Cornell, 106, U. S. 395, page 398.
Barney v. Latham, 103, U. S. 205.
Blake v. McKim, id. 336.

The second section of the act of March 3rd, 1875, so far as it applies to the present case is as follows: "Sec. 2, * * * And when in any suit mentioned in this section there shall be a controversy which is *wholly* between citizens of different States, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy, may remove said *suit* into the circuit court of the United States for the proper district."

As to the construction of this second clause of Sec. 2, we quote from the opinions of Judges McCrary and Treat. Judge Treat says: The first section of the act of 1875, which pertains to jurisdiction on the ground of the citizenship of the parties, merely states what in the light of federal decisions had a fixed and definite meaning, viz: that all necessary parties, plaintiff or defendant, should be citizens of different States. The question of original jurisdiction having been thus established by the first section, the second section proceeded to state what cases pending in the State court could be removed. As the jurisdiction of the federal courts could not even by an act of congress transcend con-

stitutional limits, the act in question prescribed what should within constitutional limitations confer original jurisdiction, and what the federal courts might obtain through removals. It is obvious that what congress could not confer as original jurisdiction it could not confer through removals.

The controversy must be *wholly* between citizens of different States. Suppose some of the plaintiffs are citizens of the same State as the defendants, and the other plaintiffs are not, or that some of the plaintiffs are non-resident and others resident, and some of the defendants are resident and non-resident, can any one of the plaintiffs or defendants remove the case? Is not the old rule recognized, viz: that when all the plaintiffs and all the defendants are citizens of different States then the case is one of which a federal court could have jurisdiction if originally brought therein; and recognizing that rule when a like case is instituted in a State court, either one of the plaintiffs or defendants in such a case may remove the entire suit? The term "*wholly*" should apply to the relationship of the parties plaintiff and defendant.

See also, Mooney v. Agnew, 2, McCrary 89, page 90.

Hyde v. Ruble, 1, McCrary 513.

The case now here is one for libel, once tried in the State court and removed subsequently. One of the two alleged wrong-doers asks the case to be removed as to him, leaving his co-defendant, who is a citizen of the same State as plaintiff, to pursue the controversy between them in the State court, while the plaintiff is brought here to pursue the other defendant in this forum. Thus the one case split into two parts is to proceed at the same time in two different forums. The plaintiff is entitled if he prevails to a judgment against both defendants, although he could have but one satisfaction. If the removal is permissible by one can the case be wholly determined with that one only present,

or can it be said that the controversy is wholly between citizens of different States.

"To entitle a party to a removal under this clause there must exist in the suit a *separate and distinct cause of action* in respect to which all the necessary parties on one side are citizens of different States from those on the other."

Hyde v. Ruble, 104, U. S. 407, page 409.

There is no separate and distinct cause of action in this case, there is but one cause of action, the libellous publication made jointly by both defendants and for which they are jointly sued. The defendant suggested in argument that unless a suit could be so split as he attempts to do with this, a plaintiff could join any resident with a non-resident defendant, wait till the trial begins, dismiss as to the resident and keep the non-resident in the State court against his will. This could not be the case under the law as it now stands; unless the resident defendant was a proper or necessary party to the controversy, the non-resident defendant could on proper petition and presentation of the matter have the suit removed to the United States court. But the entire suit would go.

Here there is but one controversy, viz: whether or not the defendants are guilty of uttering and publishing the libel on plaintiff.

Because a suit may be brought in one way or another, or against on or the other or both of the parties liable, the cause of action is not changed, and although it is brought in one way or the other or against one, the other or both the parties, individually or jointly, the cause of action still remains the same.

If this is a separable controversy and can be fully determined without the presence of defendant Swope, still the law does not authorize the splitting up of the case as has

been done in this instance, but the whole suit must be removed to the federal court. In his opinion in this case Judge McCrary says: "The provision in the second section of the act of March, 1875, above quoted, manifestly applies to the same class of cases described in the act of 1866. It may well be supposed that the evils growing out of the practice of attempting to try different parts of the same suit in different forums led congress to so change the statute as to put an end to that practice. For some purposes the act of 1866, may remain in force, but in so far as it authorized the severance of causes in the State court and the transfer of a part to the federal court for trial it is superceded by the act of 1875."

That the whole case should be removed, has been held also in

Arapahoe Co. v. Kansas Pac. R. R., 4 Dill. 277, p. 287.

Barney v. Latham, 103 U. S. 205.

The petition for removal was not filed within the time required by the statute. The statute of March 3d, 1875, section 3, provides: "That whenever either party, or any one or more of the plaintiffs or defendants entitled to remove any suit mentioned in the next preceding section, shall desire to remove such suit from a State court to the Circuit Court of the United States, he or they may make and file a petition in such suit in such State court, *before or at the term at which said cause could be first tried, and before the trial thereof*, for the removal," etc.

The application of this clause has been frequently passed upon by the Federal courts, and the time for filing such petition well settled.

See Mooney v. Agnew, 2 McCrary, 89.

Murray v. Holden, 1 McCrary, 341.

Ames v. Col. Cent. R. R., 4 Dill. 261.

Craigie v. McArthur, *id.* 474.

Atlee v. Potter, *id.* 559.
Babbitt v. Clark, 103 U. S. 606.
Removal Cases, 100 U. S. 457, p. 472.

In Missouri, when the defendant is personally served or summoned, the case is triable at the return term, that is, the first term after suit is filed, if filed fifteen days before a term, but if not filed fifteen days before, then the return term is the second term after the petition is filed.

Rev. Stat. Mo., 1879, p. 602, § 3514.

The terms of the St. Louis Circuit Court begin on the first Mondays of October, December, February, April and June.

This suit was triable at the June term, 1879, the case was tried at the April term, 1880, a motion for a new trial was made, which was sustained at the December term, 1880, and not until the December term, 1881, to-wit, on January 20, 1882, did defendant file his petition and affidavit for removal.

We respectfully submit that the decision of the circuit court should be sustained, and the cause remanded to the State court.

JO. BROADHEAD ~~& HAEUSSLER,~~

Attorneys for Defendant in Error.

CHAMBERS
vs.
HOLLAND AND SWOPE. } MOTION TO REMAND.

OPINION OF JUDGE McCRARY.

It is understood that this is an attempt to remove a *part* of the case from the the State court. One defendant seeks to remove the cause so far as he is concerned, leaving the case as against the other defendant to go on in the State court. This is attempted under the provisions of § 639 of the Revised Statutes of the United States, and the proceeding is sought to be upheld under that section, upon the ground that there is a controversy between the defendant removing, and the plaintiff (citizens of different States), which can be finally determined "without the presence of the other defendant," who is a citizen of this State. This is denied, but without considering the question whether it be so or not, let us inquire whether as the law now stands, the case can under any circumstances be split, and a portion tried here and the other in the State court.

This inquiry involves a discussion of the question whether the second section of the act of March, 3, 1875, repeals or modifies section 639 of the Revised Statutes. That section, among other things, provides as follows: "When the suit is against an alien and a citizen of the State wherein it is brought, or is by a citizen of such State against a citizen of the same and a citizen of another State, it may be removed as against said alien or citizen of another State upon the petition of such defendant, filed at any time before the trial or final hearing of the cause, if so far as it relates to him, it is brought for the purpose of restraining or enjoining him, or is a suit in which there can be a final

determination of the controversy, so far as it concerns him, without the presence of the other defendants as parties in the cause."

This statue undoubtedly authorized the removal of a part of a cause, and if it remains in full force, the present case so far as it concerns the defendant removing is properly here, assuming of course that in so far as it concerns him it can be heard and determined without the presence of his co-defendant.

But the later act of March 3, 1875, deals with the same subject and the question is whether it does not supercede and modify the earlier statute, at least so far as to require the removal of the whole case, if any part of it is removed. Section two of that act, provides for the removal of causes involving the sum or value of $500 or more, and in which there shall be a controversy between citizens of different States, and then proceeds as follows: "And when in any suit mentioned in this section there shall be a controversy which is *wholly* between citizens of different States and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove *said suit* to the circuit court of the United States for the proper district."

We *italicise* the words *said suit* in the above quotation because we think they were intended to provide for the removal of the whole suit and not a part of it.

The provision manifestly applies to the same class of cases described in the act of 1866, and embodied in Sec. 639, Revised Statutes, above quoted. It may well be supposed that the evils growing out of the practice of attempting to try different parts of the same suit in different forums led congress to so change the Statutes as to put an end to that practice. For some purposes the act of 1866, may remain in force, but in so far as it authorized the severance of causes in the State court and a transfer of a part to the federal court for trial, it is superceded by the act of 1875."

OPINION OF JUDGE TREAT.

While I fully concur that the motion to remand must be sustained, it may be well to add a few suggestions in support thereof.

Under act of 1866, it had been held with sharp dissents that a cause pending in a State court could be split into parts, some of which parts could be heard by removal in the United States courts and the other proceeded with in the State court. Hence this unseemly condition of a cause would prevail in many instances, viz: that the federal court would try the cause as to one defendant and the State court try the same cause at the same time against the other defendants, to the great accumulation of costs and expenses, and the possible determination of the rights of the parties differently; so that one would have his cause adjudicated one way in the federal forum and the other in a different way in the State forum. Under such "splitting" process each court has full jurisdiction of the parties before it, and could proceed to final judgment. Thus it might be that two parties jointly sued and jointly liable, would be left through separate and final judgments in entirely distinct positions, although their obligations or deenses were the same. If the judgment in the State court was for the remaining defendant there, why should he not have the benefit of the judgment in his favor, irrespective of wat has been determined against the other defendant in the federal forum, and *vice versa*?

The anomalies of such proceedings which many court. held to be allowable, led to the change of the rule as indicated in the act of 1875.

My views of the true construction of the act of 1866, were sharply expressed in a dissenting opinion years ago; but the right to "split" cases under the act of 1866 having

afterwards been upheld judicially, it became necessary to correct the mischief by statute.

The act of 1875 must be interpreted with reference to all its provisions, and to the mischief to be corrected. By its terms the original jurisdiction of the Federal courts was enlarged far beyond what had previously existed; designed, apparently, to cover the full sweep of the Federal Constitution. The first section of that act which pertains to jurisdiction on the ground of the citizenship of the parties, merely states, what in the light of the Federal decisions had a fixed and definite meaning, viz: that all necessary parties, plaintiff and defendant, should be citizens of different States.

The long line of Federal decisions on that subject need not be cited or reviewed, for they are familiar to all.

The question of original jurisdiction having been thus established by the first section, the second proceeded to state what cases pending in the State court could be removed. As the jurisdiction of the Federal courts could not, even by an act of Congress, be made to transcend constitutional limits, the act in question prescribed what should, within constitutional limits, confer original jurisdiction, and what Federal courts might obtain through removals. It is obvious that what Congress could not confer as original jurisdiction in could not confer through removals. If all the parties must be citizens of different States except where merely formal, why let some of the parties respective remove the cause as to them, when it could not be wholly determined without the presence of the others?

The language of the second section is, that where a case is pending in a State court in which there is "a controversy between citizens of different States" etc., "either *party* may remove" etc. What is meant by a party; if one of many plaintiffs or defendants, leaving his co-plaintiffs or co-defendants in the State court still to pursue or be pursued there, as the case might require, irrespective of the legal

fact that the case could not be decided in either court without all of the plaintiffs or defendants?

That no such absurdity was contemplated is clear from the language which follows in the same section, viz:

"And when in any suit mentioned in this section there shall be a controversy which is *wholly* between citizens of different States, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants *actually* interested in such controversy, may remove," etc.

The question presented under the language last quoted called for a judicial interpretation of the words "wholly between citizens of different States." Suppose some of the plaintiffs are citizens of the same State as the defendants, and the other plaintiffs are not, or that some of the plaintiffs are non-resident and the others resident, and some of the defendants are resident and non-resident, can any one of said plaintiffs or defendants remove the case? Is not the old rule recognized, viz: that when all the plaintiffs and all the defendants are citizens of different States, then the case is one of which the federal court could have jurisdiction if originally brought therein; and recognizing that rule when a like case is instituted in a State court, either one of the plaintiffs or defendants in such a case may remove the entire suit? If that be not the true construction of the act of 1875, the former anomalies, and even worse, would prevail. The term "wholly" should apply to the relationship of the parties, plaintiff and defendant. A citizen of this State suing in conjunction with other and necessary plaintiffs who are citizens of another State, citizens of this State should not be, at the mere instance of a co-plaintiff, nor should such citizen defendants be forced into a foreign jurisdiction. Certainly the citizens of a State are to be considered in such matters as well as non-residents.

The case now here is one for libel, once tried in the State court and removed subsequently

Whether the facts would enable the case to be removed on the ground of time is not now considered, for no point is made thereon.

One of the two alleged wrong doers asks the case to be removed as to him, leaving his co-defendant, who is a citizen of the same State as plaintiff, to pursue the controversy between them in the State court, while the plaintiff is brought here to pursue the other defendant in this forum. Thus, the one case split into two parts is to proceed at the same time in two different forums. The plaintiff is entitled, if he prevails, to a judgment against both defendants, although he can have only one satisfaction. If the removal is permissible by one, can the case be "wholly" determined with that one only present, or can it be said that the controversy is wholly between citizens of different States.

But the points involved have been fully discussed and settled by the United States Supreme Court in the cases of Barney v. Latham, 103 U. S. Rep. 205, and Blake v. McKim, 103 U. S. Rep. 336, and hence these comments might have been spared, as they seek only to enforce the reasons and rules therein expressed.